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IN THE SUPREME COURT OF
THE UNITED STATES

1982 OCTOBER TERM

GORDON S. MIRKIN

V.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

# PETITION FOR CERTIORARI

GORDON S. MIRKIN, PRO SE
4 BUCHANAN ROAD
MARBLEHEAD, MASSACHUSETTS
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(617) 631-1020

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the petitioner satisfy the criteria for granting a new trial on the basis of newly discovered evidence as set forth in United States v. Wright, 625 F.2d 1017 (1st Cir. 1980)?

2. Should the District Court have applied the standard of Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928) and granted a new trial?

3. Can this Court establish more functional guidelines for criteria for granting a new trial on the basis of newly discovered evidence to afford petitioners the right to due process under the Fifth Amendment of the United States Constitution?

## LIST OF PARTIES

All parties appear in the caption of the case.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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GORDON S. MIRKIN,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, GORDON S. MIRKIN, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the case of United States v. Mirkin, decided on May 24,1982.

## CITATIONS TO OPINION BELOW

The first opinion of the First Circuit Court of Appeals is reported at 649 F.2d 78

(1981). The second opinion of the First Circuit Court of Appeals is reported at 678 F.2d (1982). The opinion of the District Court for Massachusetts is not reported.

## JURISDICTION

The indictment against the petitioner was brought under 26 U.S.C. § 7201. The second opinion of the First Circuit Court of Appeals was filed on May 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and the Rules of this Court.

## STATEMENT OF THE CASE

Petitioner was indicted on February 14,1980 on three counts of income tax evasion, in violation of 26 U.S.C. §7201. The indictment alleged that the petitioner had evaded taxes by willfully understating his income for 1972, 1973 and 1974. At the trial the government relied upon Gerald Meiselman, the accountant who had prepared petitioner's tax returns to prove willful evasion. Meiselman testified that he recalled that the petitioner had instructed him not to attribute certain bank deposits to income. The petitioner contradicted Meiselman's testimony and testified he had made full disclosure to Meiselman, that the deposits were a matter of record at his bank and he had relied on Meiselman to prepare accurate and complete returns.

The trial became a question of credibility-was the jury to believe petitioner or Meiselman? The trial judge focused his charge directly on this issue, calling it "the critical question" for the jury. The jury resolved the question in favor of Meiselman's credibility, convicting

the petitioner, on all three counts. In denying petitioner's earlier motion for new trial, the trial judge again characterized the key issue as credibility of petitioner or Meiselman/ See United States v. Mirkin, 649 F.2d 78,81 (1st Cir. 1981).

Approximately three months after he testified, Meiselman was examined by Herbert Rothfarb, Ph.D. for disability insurance purposes and was found "(c)learly . . . no longer able to function as a CPA", suffered from "striking" memory problems, inability to "reason clearly or interpret facts", a loss of "approximately 25 to 30 IQ points", slowed-down ability to calculate, to retain, to recall, and to maintain a sustained effort", "difficulty in storing information","difficulty performing adequitely at a high school level". At the same time he denys memory damage, "insists that he can perform as before, i.e. as a competent person", yet he can be "friendly and cooperative . . . talkative and quite verbal"."His memory results seem artificially elevated . . . however, it is clear he cannot reason clearly or integrate facts", and

"in short, he has lost a great deal of his intelligence,(and) memory"; he remains "embittered . . . obsessional . . . egocentric . . .schizoid and sociopathic". Petitioner's second motion for a new trial was principally based on Dr. Rothfarb's extensive psychological report of Meiselman's condition, which showed that Meiselman's claim during cross-examination at the trial that his memory was not damaged by the auto accident of 1975 was absolutely untrue. Furthermore, Meiselman's apparent ability to fool himself and the untrained or uninformed observer as to his damaged memory would make it unusually difficult for a judge or jury to go behind his friendly, highly verbal exterior to find the defective memory,without having the advance knowledge of his problem. Of course,with that advance knowledge Meiselman could be evaluated as to credibility by the court.

The District Court, however, denied the motion without a hearing and the First Circuit Court of Appeals upheld the opinion of the District Court in a Per Curium decision.

## REASONS FOR GRANTING THE WRIT

### I. PETITIONER'S MOTION FOR NEW TRIAL SATISFIED THE CRITERIA FOR GRANTING A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE OF THE CONCEALED DAMAGED MEMORY OF THE CHIEF GOVERNMENT WITNESS. FAILURE OF FEDERAL TRIAL COURT TO APPLY SUCH CRITERIA CONSTITUTIONALLY REQUIRES REVERSAL.

The petitioner's motion for a new trial was based on the discovery after the trial that the chief government witness, Gerald Meiselman, had concealed the severe damage to his memory, based on the discovery of a report of Herbert Rothfarb, Ph.D. prepared independently for disability insurance purposes. During the doctor's examination, Meiselman was "friendly, cooperative . . . talkative and quite verbal". See Appendix " ". During the course of the trial, Meiselman presented the same attributes, thereby concealing the damage to his memory to a degree that it was not discovered by the judge, jury, or counsel for government or defense.

The severity of the damage to the chief witness of the government was sufficiently severe to warrant petitioner's motion for a new trial. The petitioner's motion satisfied the criteria for granting a new trial on the basis of newly discovered evidence as set forth in United States v. Wright, 623 F.2d 1017, 1019 (1st Cir. 1980):

> A motion for new trial on the basis of newly discovered evidence will ordinarily not be granted unless the moving party can demonstrate that: (1) the evidence was unknown or unavailable to the defendant at the time of trial; (2) failure to learn of the evidence was not due to lack of diligence by the defendant; (3) the evidence is material, and not merely cumulative or impeaching; and (4) it will probably result in an acquittal upon the retrial of the defendant. See Pelegrina v. United States, 601 F.2d 18, 20-21 (1st Cir. 1979); In re United States, 565 F.2d

173, 177 (1st Cir. 1977); John v. United States, 32 F. 2d 127, 129 (8th Cir. 1929); C. Wright & A. Miller, Federal Practice and Procedure § 557 at 515 (1969).

The District Judge denied the petitioner's motion on the ground that it failed to meet any of these four criteria. That decision was manifestly erroneous as the motion did, in fact, satisfy all of the Wright criteria.

A. "The evidence was unknown or unavailable to the defendant at the time of trial."

The evidence in question, the report of Dr. Rothfarb, was not even in existence at the time of trial. His examination did not commence until some three months after Meiselman had testified. His report was not completed until approximately six months after the trial, and was not received by the petitioner's appellate counsel until almost a year after the trial. By its very nature, the report itself must be considered to be "newly discovered" since it was not in existence or capable of discovery at the time of trial. Furthermore, the chief government

witness, Meiselman, actually concealed his lack of effective memory and actively denied under cross-examination that he had this defect. The truth of the inability of Meiselman to meet the basic capacity of memory needed to be a competent witness never would have come to light, but for Dr. Rothfarb's report after the trial.

If the issue in the instant case had been whether a traffic light had been red or green at a particular time and Meiselman had testified that his memory was that the light had been red and later a doctor had examined him and found him to be color-blind; the court would have to reopen the case because if would be unable to rely on the testimony of a color-blind person as to color, if color were the issue in the case. Here the situation is that Meiselman's testimony on the issue in the case was based on a memory that was damaged and unreliable, but that defect was not only unseen by the court and the jury but, according to Dr. Rothfarb, Meiselman himself was not consciously aware of it at the time of the trial. Therefore, the District Court

erred in holding implicitly that the evidence was not "newly discovered". C.f. United States v. Glickman, 604 F.2d 625, 632-3 (9th Cir. 1979) (Post-trial psychiatric reports newly discovered evidence but insufficient to warrant new trial.)

B. "Failure to learn of the evidence was not due to lack of diligence by the defendant."

The facts underlying Dr. Rothfarb's post-trial report certainly existed at the time of trial. However, neither the defense nor the Government was aware of the extent of Meiselman's disability at the time of his testimony. The defense asked Meiselman on cross-examination whether the accident had impaired his memory. Meiselman responded that it had not.

Similarly, in United States v. Atkinson, 429 F. Supp. 880 (E.D.N.C. 1977), a critical government witness falsely denied prior convictions on cross-examination. Post-trial discovery of his record was held to be newly discovered evidence warranting a new trial without any mention of counsel's diligence.

This is not a case, as previously stated, of the k..owing and intentional use of perjured testimony by the prosecution. Rather, it is a case, in which evidence newly discovered, after trial, previously unknown to the prosecution and the defense, reveals that the government witness Pennington, whose credibility was essential to sustain petitioner's conviction, testified falsely in denying prior criminal convictions. Rule 33, Federal Rules of Criminal Procedure, provides: "The court on motion of a defendant may grant a new trial to him if required in the interest of justice . . ." Where, as in this case, the Government's case must stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny. Gordon v. U.S., 343 U.S. 414, 417, 73 S.Ct. 369, 372, 97 L.Ed 447 (1953). Id. at 844.

Defense counsel in the instant case may have been suspicious of some memory damage resulting

from the accident, just as Atkinson's defense counsel may have suspected a stronger motive for the witness's testimony. However, once the witness denied the matter, counsel could do no more. There was plainly no lack of diligence in either case. Cf. United States v. Dean, 647 F.2d 779, 782-5 (8th Cir. 1981) (While condemning defense counsel's delay in not bringing rumors of juror bias to the attention of the court during trial, Court of Appeals noted that he had no direct proof until after the verdict, and reversed denial of the motion for a new trial.)

Also, if the government had been aware that Meiselman's memory had been damaged, it had an affirmative dury to correct his false denial. C.f. Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972). It may also have had a duty to disclose this knowledge to the defense as exculpatory evidence. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976). Meiselman's concealment was the cause of the non-disclosure, not lack of diligence by the petitioner.

By the term "concealment" the petitioner does not mean to impart intent on the part of the witness to mislead the court. However, due to the unusual nature of the damage to the head of the witness and to his memory, it is not apparent that he has the difficulty unless one had the opportunity to verify the "alleged facts"stated by the witness from his faulty memory with reality, in order to find that the witness was not telling the truth, even though the words were spoken with great conviction and in a "friendly, talkative... quite verbal" manner, according to Dr. Rothfarb. In point of fact, Dr. Rothfarb indicates emphatically that Meiselman has completely convinced himself that his memory is intact and accurate.

By refusing to question Dr. Rothfarb, to order an examination of Meiselman, or even to conduct a hearing on the issue the District Court Judge implies that he is still convinced of the credibility of the testimony of the witness, including his memory; despite any degree of diligence on the part of petitioner's counsel.

C. "The evidence is material and not merely cumulative or impeaching."

As noted above, Meiselman's testimony formed the very heart of the Government's case against the petitioner. His testimony, based on his memory, was that the petitioner had instructed him not to attribute some deposits to income was not corroborated by other evidence and was contradicted by the petitioner's own testimony. However, Meiselman's credibility was not otherwise attacked.

It is difficult to imagine evidence more material in these circumstances than Dr. Rothfarb's impartial findings as to Meiselman's incapacity. The findings raise questions as to whether Meiselman should have been allowed to testify at all. As the Court of Appeals noted in United States v. Benn, 476 F.2d 1127 (D.C. Cir. 1973), the competency of brain damaged or retarded witnesses presents a particularly difficult problem for both the judge and the jury, in which psychiatric examinations may be of assistance.

The competency of the witness to

testify before the jury is a threshold question of law committed to the trial court's discretion. It remains for the jury, of course, to assess the credibility of the witness and the weight to be given her testimony. Competency depends upon the witness' capacity to observe, remember,and narrate as well as an understanding of the duty to tell the truth. It also requires an assessment of the potential prejudicial effects of allowing the jury to hear the testimony. Mental retardation may be so severe, capabilities so impaired, and the testimony so potentially prejudicial that it should be barred completely by the judge. Or there may be sufficient indications of a witness' capacity and of the reliability of her testimony that it should be heard and assessed by the jury, albeit with a cautionary instruction. . . .

The dangers which must be consid-

ered in determining whether a mentally retarded (witness) is a competent witness must also be considered by the jury in assessing her credibility, particularly since "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. . . ." The jury may be aided in its task by the results of a psychiatric examination, even when such an examination is not necessary to the judge's determination of competency. When an examination should be ordered to aid the jury is also a judgment, involving a balancing of need against dangers, which is committed to the discretion of the trial judge. Here, the strong indications of reliability of the (witness') testimony weigh heavily against the need for an examination. Also, the jury was not left to make its credibility decision without information as to the witness' defect;

it had the frank and comprehensive testimony of the girl's father to assist it. In these circumstances, we cannot say that the trial judge erred in failing to order a psychiatric examination of the witness to aid the jury. Id.at 1130-1 (footnotes omitted).

Here, in contrast, neither the judge nor the jury was afforded the opportunity at the petitioner's trial to consider the impact of Meiselman's disability on his ability to remember or to testify truthfully.

Nor can the evidence be said to be cumulative or merely impeaching. In Amos v. United States, 218 F. 2d 44 (D.C. Cir. 1954), the defendant moved for a new trial based upon the testimony of a previously unavailable witness who would have supported the defendant's trial testimony that he had acted in self-defense. The Circuit Court reversed the denial of his motion for a new trial.

We think a new trial should have been granted. We have held that newly

discovered evidence which is merely cumulative does not require a new trial. Thompson v. United States, 88 U.S. App. D.C. 235, 188 F.2d 652. But that principle should not be applied where, as here, a disinterested witness becomes available who can supply evidence of vital importance and the only similar evidence at the trial was that of the defendant himself.

The same analysis applies here. Dr. Rothfarb was a disinterested witness whose testimony was of vital importance to the defense and was not available at trial.

The credibility of the chief witness had not been seriously attacked during the trial because the damage to his brain was not apparent as has been noted previously. Therefore an attack on the witnesses credibility in the motion for a new trial would be fresh and most damaging to the entire foundation of the government case and not merely an "additional part of a cumulative attack on a witnesses's

credibility". See United States v. Gilbert, 668 F.2d 94 (2nd Cir. 1981).

Accordingly, the District Court erred in holding that the evidence was not material.

D. "It will probably result in an acquittal upon retrial of the defendant."

As noted in the previous section, Dr. Rothfarb's findings might have led a trial judge to disqualify Meiselman as a witness. United States v. Benn, supra. If Meiselman were disqualified as a witness, the Government would have no proof whatsoever that the petitioner had willfully attempted to evade his income taxes in the years 1972, 1973 and 1974. Exclusion of the testimony of the chief government witness, Meiselman, would surely have led to the acquittal of the petitioner. Inclusion of Meiselman's testimony along with the doctor's would greatly shift the weight of credible evidence to favor the petitioner. It may be useful

to compare Zeigler v. Callahan, __F.2d__ (1st Cir. 1981) (No. 81-1015, September 22, 1981; with Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980) as both are concerned with the likely impact of psychiatric evidence on the jury. In Chavis, as in the instant case, the report concerned the veracity of the government's principal witness. The Fourth Circuit found a due process violation in the non-disclosure and reversed.

> We do not doubt that Hall's psychiatric report if it had been made available to defense counsel might have had a substantial impact on the outcome of the case. If the jury had known that Hall lacked the ability to recall accurately events, about which he testified with such exquisite detail, that had occurred at least one and one-half years prior to the time that he was testifying. That Hall possessed limited intelligence was a fact which the jury could properly have known for its effect on his credibility. See

United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461, 469 (4th Cir. 1980). Nor do we doubt that his statement in the report that he did not participate, although present on the scene, in the burning of the store when he testified to the contrary at trial would surely shake his credibility. Id. at 224.

In Zeigler, however, unlike the instant case and unlike Chavis, the Government's case did not stand or fall on Lincoln's credibility and thus the psychiatric report did not create a reasonable doubt which did not otherwise exist. Zeigler, supra, __ F.2d at __ (Slip Op. at 26).

It must be emphasized that Dr. Rothfarb's testimony would go directly to the truth and veracity of Meiselman and the accuracy of his memory. Even if it is viewed in this light as "merely impeaching", it is so vital to the truth finding function of the jury as to mandate a new trial.

It is generally within the sound

discretion of the trial court to grant or deny a new trial on the ground of alleged newly discovered evidence which is merely cumulative or impeaching. United States v. Anderson, 532 F.2d 1218, 1230 (9th Cir. 1976); United States v. Cozzetti, 469 F.2d 684 (9th Cir. 1972). Ordinarily, newly discovered evidence affecting a witness's credibility at trial "will not support a motion for a new trial, because new evidence which is'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial". Mesarosh v. United States, 352 U.S. 1, 9, 77 S.Ct. 1, 5, 1 L. Ed. 2d 1, 5 (1956). However, it is within the Court's power to grant a new trial if it appears that, had the impeaching evidence been introduced, it is likely that the jury would have reached a different verdict.

United States v. Davila, 428 F. 2d 465 (9th Cir. 1970); United States v. Lewis, 338 F.2d 137 (6th Cir. 1964); cert. denied, 380 U.S. 978, 85 S.Ct. 1342, 14 L.Ed.2d 272, Winer v. United States, 228 F.2d 944 (6th Cir. 1956), cert. denied, 351 U.S. 906, 76 S.Ct. 695, 100 L.Ed. 1442.

The newly discovered evidence herein is certainly not of a cumulative nature, but it is definitely impeaching. However, under the circumstances of this case, it is impeaching evidence with serious implications regarding the truth and veracity of Rapisardi's testimony, a factor which had to weigh heavily on the minds of the jurors during their deliberation. This Court feels very strongly that the additional piece of impeaching evidence could have been the proverbial "straw that broke the camel's back" with respect to Rapisardi's credibility, which would

have almost assuredly resulted in a different verdict by the jury. Thus it is my firm belief that under the facts of the instant case, the ordinary rule, as espoused in Mesarosh v. United States, supra, for not granting a new trial is inapplicable, and that "the evidence here does not come within the general interdiction that the newly discovered evidence which is merely impeaching is ordinarily insufficient to warrant a new trial". United States v. Gordon, 246 F. Supp. 522 (D.D.C. 1965). United States v. Lipowski, 423 F. Supp. 864, 867 (D.N.J. 1976)

Thus, in the circumstances of the petitioner's case, the district court erred in underestimating the probable effect of the proferred evidence, and in denying the motion for a new trial.

II. The District Court Should Have Applied The Standard of Larrison V. United States, 24 F.2d 82 (7th Cir. 1928) And Granted A New Trial.

As has been demonstrated, Meiselman testified falsely when he denied memory damage. In Larrison v. United States, 24 F. 2d 82, 87 (7th Cir. 1928), a less stringent burden of proof is required where a material witness testifies falsely. The First Circuit had recognized the applicability of the Larrison standard in United States v. Wright, supra, 625 F.2d at 1020.

> In Larrison, the Seventh Circuit stated that when the motion for new trial is based on an allegation that a material witness testified falsely at trial, a new trial should be granted if: (1) the court is "reasonably well satisfied" that the testimony was false, and (2) without the false testimony the jury "might have reached a different conclusion." Id. at 87. Although dicta in at least one of our opinions sugguests that this circuit has not

decided whether to apply the Larrison rule, see In re United States, supra, ., 565 F.2d at 173 n. 3, we have suggested that the rule is applicable in cases in which the new evidence demonstrates that the testimony in question was deliberately false. See Pelegrina v. United States, supra, 601 F. 2d at 21, United States v. Street, 570 F.2d 1, 4 (1st Cir. 1977); United States v. Strauss, 443 F. 2d 986, 989-90 (1st Cir.), cert. denied, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971).

The petitioner concedes that Meiselman's false denial might not have been perjurious per se as his disability presumably prevented him from realizing that he was testifying falsely or from intending to testify falsely. However, the ignorance of the witness that he was testifying falsely should not be fatal to a claim for a new trial where, as here, the testimony was both critical to the government's case and was actually false. C.f. United States

v. Turner, 490 F.Supp. 583, 602-3 (E.D. Mich. 1979) (witness' ignorance of bargain communicated only to counsel was not fatal to motion for a new trial).

Here Meiselman's denial of damage to his memory was actually false; and his other testimony which was based upon his damaged memory at the very least might have been false. Clearly, without his false denial of disability, the jury most assuredly might have reached a different result. Furthermore, if his testimony as to his allegedly exact memory of the petitioner's instructions to him was excluded either as false or as being too unreliable, a different verdict surely would have been reached and the petitioner would not have been incarcerated in the Federal Prison at Lewisburg, Pennsylvania.

Hence, under the Larrison standard, the District Judge erred in denying the motion for a new trial.

III. The Motion For A New Trial Should Be Remanded For An Evidentiary Hearing.

The summary denial of the motion for a new trial makes it difficult for counsel and for the reviewing court to determine why the District Judge denied the motion or whether that decision was appropriate.

Indeed, a hearing would have assisted the trial judge in assessing the materiality and the probable impact of Dr. Rothfarb's testimony on a new jury. United States v. Disston, 582 F.2d 1108, 1112 (7th Cir. 1978); United States v. Rhodes, 556 F.2d 599, 601-2 (1st Cir. 1977).

It has been assumed that Meiselman had no knowledge of his memory defect and testified without harmful intent. However, if the District Court had granted a new trial or at least an evidentiary hearing an entirely new attack on the credibility of the chief government witness would be unavoidable - and it would go to the heart of the characterization of Meiselman,by the government as a witness without a reason for testifying against the

petitioner, except to tell the unbiased "truth".

This unavoidable attack would be required by Dr. Rothfarb's report, in which the doctor analyzes Meiselman and describes him as "embittered . . . obsessional . . . egocentric . . . schizoid and sociopathic".

Accordingly, at a minimum, this impartial and independent report raises questions that require that the case be remanded for an evidentiary hearing on the mental capacity and stability of the chief government witness. To fail to do so, would be to deny the petitioner his right to due process of law, as guaranteed under the Fifth Amendment of the United States Constitution.

By the most elementary consideration of Meiselman's damages capacity to recall, he cannot be presumed competent to testify. See United States v. Lightly, 677 F.2d 1027 (4th Cir. 1982), Fed. Rules Evid., Rule 601.

IV. This Court Must Establish More Clearly Defined Parameters To Guide The District Courts As To What Will Constitute Sufficient Evidence to Satisfy The Requirements Of United States v. Wright, Supra.

In the petitioner's case the chief government witness is shown for the first time to be mentally defective on post-trial examination by an independent doctor. This evidence was rejected by the court without a hearing - raising the issue of whether there is any set of facts that cannot be ignored in a motion for a new trial based upon newly discovered evidence.

## CONCLUSION

For all of the above reasons, petitioner, Gordon S. Mirkin, respectfully requests this Court to grant a Writ of Certiorari to the First Circuit Court of Appeals.

Respectfully submitted,

GORDON S. MIRKIN, Pro Se
4 Buchanan Road
Marblehead, MA 01945